Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

ROSEMARY JOHNSON-KUREK,

Petitioner,

-v-

SAMIR ABU-ABSI,
THOMAS BARDEN,
AND CAROL NELSON-BURNS
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS A. SOBECKI
Counsel of Record
811 Spitzer Bldg.
520 Madison Avenue
Toledo, OH 43604-1304
PH: (419) 242-9908
FAX: (419) 242-9937

Attorney for Petitioner

QUESTION PRESENTED

1. Whether the Sixth Circuit Court of Appeals, in claims brought by a nontenured lecturer at a university pursuant to 42 U.S.C. §§ 1983 alleging that her First Amendment rights to free speech and academic freedom were violated, correctly upheld the District Court's finding that Plaintiff's rights were not implicated or violated when a tenured faculty member attempted to require her to make specific communications to her students, when those communications would have contained specific content which was inconsistent with Plaintiff's professional judgment and which would have interfered in her teaching of the students.

PARTIES TO THE PROCEEDING

Petitioner is Rosemary Johnson-Kurek . She was Plaintiff in the District Court and Appellant in the Court of Appeals.

Respondents are Samir Abu-Absi, Thomas Barden, and Carol Nelson-Burns, in their personal capacities. They were Defendants in the District Court and Appellees in the Court of Appeals.

There are no corporate respondents.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 423 F.3d 590.

The opinion of the District Court (App. B) is unreported.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

The Eleventh Amendment to the United States Constitution provides as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case involves a balance of rights of academic freedom among a nontenured university lecturer, the University, and the lecturer's students.

Petitioner is a non-tenured lecturer in the University of Toledo's Department of English Language and Literature and the Department of Theater and Film. At all times relevant hereto, Respondent Abu-Absi was the chair of the English Department, Respondent Barden served as the Associate Dean for Humanities in the University's College of Arts and Sciences, and Respondent Nelson-Burns served as the English Department's Curriculum Director of Report Writing.

Petitioner has worked as a full- or part-time lecturer at the University since 1990. During the fall 2000 semester, Petitioner taught an organizational report writing class for the English Department. An important assessment tool for the class was a report which had to be turned in at the end of the academic term. Some of the students turned in their reports without proper citation, in some cases amounting to outright plagiarism. Because many of the affected students were exchange students whose prerequisite writing skills were lacking in comparison to other students, and for whom this was their first college-level writing course, Petitioner issued grades of "incomplete" to the affected students, to permit them opportunity to correct their work. Petitioner e-mailed those students informing them why they had been issued "incompletes" and informing them generally but purposefully of their errors.

After issuing the grades, Petitioner met with Respondent Nelson-Burns. Petitioner explained the steps she had taken and gave Nelson-Burns a copy of the e-mail she had sent to the students.

In response, Nelson-Burns demanded that Petitioner write individual letters to the affected students explaining to each student specifically what was required in their particular

case. (Apx. Pg. 12). In a memorandum sent by Nelson-Burns to Petitioner concerning the letters, Nelson-Burns stated that Petitioner should send a draft of each letter to Nelson-Burns before Petitioner sent them to the students. (Apx. Pg. 12). Specifically, and in relevant part, Nelson-Burns' memo to Petitioner made the following demand:

> As we discussed, a more specific statement needs to be prepared for ***each*** student and ***each*** student needs to be told specifically what he or she must do to finish the coursework and earn a grade. Please note that although your instructions in those published messages may seem clear, a given student may still be confused as to what is expected of him or her personally. Please draft those statements and share them with me before forwarding them to students.
>
> (emphasis in original).

Writing the individualized letters to the students would have interfered with Petitioner's assessment of the students' learning. (Apx. Pg. 12). Because the very purpose of the report was to assess what the students had learned over the academic term, detailing to the students how to correct their errors would have undermined the purpose of assigning the report and would have in effect forced Petitioner to do for the students what the students were to demonstrate they could do for themselves. Furthermore, since the students' grades were dependent in part upon their ability to write the report, hand-feeding them the solutions to their mistakes would have resulted in a report grade, and hence a final grade, not actually reflective of the students' work.

Since 1990, Petitioner with only one exception had been given two courses to teach each academic period, which

is the standard assignment for part-time teachers in English Department. However, on or about August 20, 2001, Petitioner was verbally informed that she had been given a less than standard assignment for Fall, 2001, for the purported reason that she was uncooperative and for other alleged reasons, all of which were false or were capricious and arbitrary. (Apx. Pg. 13). When the matter was brought to the attention of Respondent Abu-Absi, Chair of the Department of English, Abu-Absi refused to hear and attempt to resolve her grievance. (Apx. Pg. 14). When Petitioner approached Respondent Barden for assistance in filing a grievance in accord with the Bylaws and General Rules of the University, he told her that she was not permitted to do so. (Apx. Pg. 14).

On August 27, 2003, Petitioner filed a Complaint against Respondents, in both their official and their individual capacities, which alleged violations of Petitioner's rights of free speech and academic freedom under the First Amendment, and violations of her due process rights under the Fourteenth Amendment. Respondents timely filed an answer, and on April 13, 2004, a Motion to Dismiss or Alternatively for Judgment on the Pleadings was filed by all Respondents. In this motion Respondents contended that they had absolute 11th amendment immunity for acts committed in their official capacities and that they had qualified immunity for acts committed in their individual capacities. The 11th amendment immunity assertedly arose from the fact that Respondents all acted within the scope of their employment, and that because the university was an arm of the state, and therefore immune from suit, employees acting within the scope of their employment were *ipso facto* immune from suit. Qualified immunity for acts committed in their individual capacities assertedly existed because the challenged speech in which Petitioner refused to engage, namely, specifically informing each student exactly how to

correct each error in their reports, did not implicate the First Amendment.

Respondents also argued that, for the same reasons, even if they were not immune from Petitioner's claims, they were entitled to judgment on the pleadings in that, according to Respondents, Petitioner could state no set of facts that would entitle her to relief. Additionally, Respondents contended that Petitioner had failed to plead that Respondents acted under color of state law, and also that her claims were barred by the applicable statute of limitations.

In response, Petitioner argued that the 11th amendment did not bar injunctive relief against state officials in their official capacities for non-monetary relief, which was included within the claim. Petitioner, citing ***Parate v. Isibor***, 868 F.2d 821 (6th Cir.1989), also argued that Respondents were not immune from liability for their acts, and that Petitioner had stated a claim that would entitle her to relief, because, while the university enjoyed great latitude in pursuing its ends without interference from the government, and while faculty remained subject to reasonable supervision, faculty members enjoyed freedom to assign grades and evaluate students according to their own professional judgment, and that the First Amendment protected faculty members from being compelled to communicate specific speech to students against the professor's professional judgment.

Petitioner also argued that she had implicitly pled color of state law, and that her claims were not barred by the statute of limitations, since the injury alleged in the case, failure to provide Petitioner with a second class to teach, occurred within the limitations period.

After appropriate briefing, the District Court dismissed Johnson-Kurek's claims against all three Respondents for lack of subject matter jurisdiction, on Eleventh Amendment and qualified immunity grounds; for failure to state a claim; and, in the case of her claims against

Nelson-Burns, as time-barred. At the heart of the District Court's decision was its holding that under ***Parate***, being required to write to her students and specifically inform them how to correct the specific errors in their reports did not implicate the First Amendment.

On appeal, Petitioner argued that, considering the posture of the case before the District Court when it dismissed the Complaint, the court abused its discretion when it held that Petitioner had failed to allege that Respondent Barden's denial of Petitioner's right to file a grievance was predicated upon her interest in freedom of speech and academic freedom, because Respondent had not raised that argument in his motion to dismiss, and the court had not allowed Petitioner opportunity to amend its Complaint.

Petitioner also argued that the District Court construed ***Parate*** and the Supreme Court precedents upon which it was based too narrowly in holding that attempting to force Petitioner to write letters to her students, containing specific content which was inconsistent with Petitioner's professional judgment and which would have interfered in Petitioner's evaluations of the students, did not impinge upon any constitutionally protected speech.

Petitioner also argued that in considering the "clearly established right" aspect of qualified immunity, the court improperly focused upon the subjective beliefs of the Respondents as to whether their actions were legal or not, rather than whether the violation involved "clearly established statutory or constitutional rights of which a reasonable person would have known."

Finally, Petitioner argued that her claim against Nelson-Burns was not barred by the statute of limitations, because the injury from Nelson-Burns' actions did not accrue until Petitioner was denied a second class, which occurred within the limitations period.

In its decision affirming the trial court's dismissal of the complaint, the court focused its attention on whether the subject speech implicated the First Amendment. The court decided that it did not. The court first recognized that there were limits on the extent to which the university could require a professor to endorse the university's decisions about pedagogy and grading:

> In *Parate,* we considered the case of a non-tenured associate professor at Tennessee State University, who was required by the University to change the grade of a student from a "B" to an "A." Although the University could have changed the grade by fiat without involving Parate, Parate was required not only to change the grade himself, but to sign a memorandum stating that he had amended the grading policy for the class in a way that would retroactively justify the change of grade. Parate did sign such a memorandum, but added a notation to the effect that the change was made at the instruction of the Dean. When instructed to sign a clean copy of the memorandum without adding any notation, he refused, and, as a result, his contract was not renewed the following year. We held that the requirement that Parate personally sanction the change of grade by signing the memorandum violated his rights to free speech and academic freedom.
>
> Our concern in *Parete* was not with the University's insistence that the grade be changed, but only with the insistence that Parete himself make and endorse that change. A professor's own evaluation of a student's work, and the grade that he or she decides to assign to

> reflect that evaluation is an important part of a professor's teaching method. The grade that is affixed to a student's transcript, however, is the concern of the university. ("If [the University] deemed Parate's grade assignments improper, however, the defendants could have achieved their goals by administratively changing [the student's] grade."). In other words, the university may override the professor's evaluation, and change the assigned grade. It may not require him to publicly endorse those changes.

The court, however, saw Petitioner's situation as being materially different from Parate's situation.

> [Johnson-Kurek] was not required to communicate the ideas or evaluations of others as if they were her own. She was not even told what grades to assign her students, or what the requirements for completing the class should be. She was simply required, as one might be in preparing a syllabus, to spell out in detail the requirements she had devised. While the First Amendment may protect Johnson-Kurek's right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of a university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.

Thus, said the court, "Johnson-Kurek failed to identify any violation of her constitutional rights as a result of the alleged efforts of each Respondent to force her to write to her students." Because the court found no violation of Petitioner's First Amendment rights, the court found moot or declined to address the alternative grounds given by the district court for dismissing Petitioner's complaint.

REASONS FOR GRANTING THE PETITION

This case offers the Court an opportunity to address an aspect of academic freedom which it has never before directly addressed. While this Court on several occasions has addressed various matters of academic freedom, it has never had opportunity to address the relationship between a teacher's right to evaluate and grade her students according to her professional lights and the institution's right to maintain reasonable supervision over its teachers in advancing the ends of the institution.

Petitioner is a part-time, nontenured lecturer who was disciplined because she refused to engage in certain speech which the university, through one of its employees, demanded that she engage in. More specifically, as identified above, Petitioner, in order to evaluate the achievement of her students in a particular class, required the students to write an end-of-term report. Several students turned in their reports without proper citation, in some cases amounting to substantial verbatim plagiarism. Because of special circumstances under which some of the students labor, Petitioner chose to give incompletes to the students rather than fail them, in order that they might make the necessary corrections. Besides the in-class instruction which the students had received during the course of the term, Petitioner on her web site, to which the students had access,

provided all the information the students needed to know how to correctly write their papers.

However, Respondent Nelson-Burns demanded of Petitioner that she write individual letters to each student explaining exactly what corrections had to be made. Because the very purpose of the report was to determine what the students had learned over the course of the term, Nelson-Burns' demands that Petitioner personally and individually assist each student to rewrite his or her paper amounted to an indirect demand that Petitioner raise the grade of the student's paper, and hence raised the student's end-of-term grade.

The District Court and the Court of Appeals, narrowly construing teachers' rights of academic freedom with respect to the issuance of grades, held that Nelson-Burns' actions did not infringe upon Petitioners First Amendment rights. Because Petitioner was nontenured and worked only on term contracts, the university was free to discipline her by taking a future course away from her.

The issue before this Court affects the rights of hundreds of thousands of nontenured faculty at thousands of institutions across the country. On November 9, 2003, the American Association of University Professors (AAUP), through a joint subcommittee of its Committee on Part-Time and Non-Tenure-Track Appointments and Committee A on Academic Freedom and Tenure, released a statement which addressed the conditions and status of part-time and non-tenure-track faculty in a statement, and which was entitled *Contingent Appointments and the Academic Profession.*[1] The

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1. The AAUP's endeavors in the field of academic freedom and tenure is widely recognized. The 1940 *Statement of Principles on Academic Freedom and Tenure* was developed by AAUP and the Association of American Colleges (now the Association of American Colleges

term "contingent faculty" included both part- and full-time faculty who were appointed off the tenure track. The statement noted that in 1998, there were more than 550,000 full-and part-time non-tenure-track faculty in American higher education, and that those numbers were continuing to grow. Furthermore, those figures represent a substantial increase in both the numbers and of portions of nontenured faculty over prior decades. These figures are consistent with figures released in 1993 and in 2003 by the National Center for Education Statistics[2], which tended variously to show increases in the proportion of post-secondary education teachers holding nontenured positions or on nontenured tracks.

Thus the outcome of this case will have a substantial impact upon large numbers of nontenured university and college-level professors, instructors, and lecturers.

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and Universities), and has been endorsed by over 180 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks. See AAUP, 1940 Statement of Principles on Academic Freedom and Tenure, reprinted in AAUP Policy Documents & Reports 3-10 (2001 ed.), available at http://www.aaup.org/statements/Redbook/1940stat.htm ("1940 Statement"). The University of Toledo is one of the institutions which have recognized the 1940 Statement. The 1940 Statement has been cited by the Supreme Court. See, e.g., ***Board of Regents v. Roth***, 408 U.S. 564, 579 n.17 (1972); ***Tilton v. Richardson***, 403 U.S. 672, 681-82 (1971).

[2]The National Center for Education Statistics (NCES), located within the U.S. Department of Education and the Institute of Education Sciences, is the primary federal entity for collecting and analyzing data related to education.

In the joint subcommittee's statement, recognition was given to the impact on academic freedom of non-tenure status. While the concept of academic freedom covers a wide variety of situations, the statement specifically recognized the impact its absence might have on a teacher's grades and evaluations of her students:

> Currently, neither peer review nor academic due process operates adequately to secure academic freedom for most contingent faculty members. The lack of adequate protection for academic freedom can have visible results. Contingent faculty may be less likely to take risks in the classroom or in scholarly and service work. The free exchange of ideas may be hampered by the specter of potential dismissal or nonrenewal for unpopular utterances. In this chilling atmosphere, students may be deprived of the robust debate essential to citizenship. They may be deprived of rigorous and honest evaluations of their work. Likewise, faculty may be discouraged from explorations of new knowledge and experimentation with new pedagogies. Perhaps most important, institutions may lose the opportunity to receive constructive criticism of academic policies and practices from a significant portion of the academic community.[3]

The concerns of the AAUP are echoes of concerns expressed by this Court. The Supreme Court has long

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3 . Contingent Appointments and the Academic Profession, http://www.aaup.org/statements/SpchState/Statements/contingent.htm

recognized that "academic freedom" is "a special concern of the First Amendment." ***Keyishian v. Bd. of Regents of the Univ. of New York***, 385 U.S. 589, 603 (1967).("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."). This is so not withstanding that it is "not a specifically enumerated constitutional right." ***Regents of the Univ. of Cal. v. Bakke***, 438 U.S. 265, 312 (1978) (Powell, J., concurring). Academic freedom has a "transcendent value to all of us and not merely to the teachers concerned." ***Keyishian***, *supra*, at 603.

Of course, academic freedom "is used to denote both the freedom of the academy to pursue its end without interference from the government ... and the freedom of the individual teacher ... to pursue his ends without interference from the academy; and these two freedoms are in conflict." ***Piarowski v. Illinois Community College Dist.*** 759 F.2d 625, 629 (7th Cir.), cert. denied, 474 U.S. 1007, 106 S.Ct. 528, 88 L.Ed.2d 460 (1985). Thus "a nontenured professor does not escape reasonable supervision in the manner in which she conducts her classes or assigns her grades." ***Parate v. Isibor***, 868 F.2d 821, 827 (6th Cir. 1989), citing ***Megill v. Board of Regents of the St. of Fla.***, 541 F.2d 1073 (5th Cir.1976). For example, the university may constitutionally choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods do not conform to institutional standards. ***Hetrick v. Martin***, 480 F.2d 705, 708 (6th Cir.), cert. denied, 414 U.S. 1075, 94 S.Ct. 592, 38 L.Ed.2d 482 (1973).

At the same time, the courts have also afforded substantial protection to the First Amendment freedoms of individual university professors. In ***Sweezy v. New Hampshire***, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957), this Court concluded that "[t]eachers and students must always remain free to inquire, to study and

to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

In ***Perry v. Sinderman***, 408 U.S. 593, 596-8, 92 S.Ct. 2694 (1972), the Court made it clear that while a nontenured teacher may be fired for any reason or for no reason at all, she cannot be fired (or non-renewed) for the exercise of constitutionally protected rights:

> The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.
>
> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech.
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> * * *
>
> Thus, the respondent's lack of a contractual or tenure 'right' to re- employment for the 1969--1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. **Shelton v. Tucker** [(1960), 364 U.S. 479, 81

S.Ct. 247]; **Keyishian v. Board of Regents** [(1967), 385 U.S. 589, 87 S.Ct. 675]. We reaffirm those holdings here.

Perry v. Sinderman (1972), 408 U.S. 593, 596-8, 92 S.Ct. 2694.

Four years earlier, in ***Pickering v. Board of Educ.***, 391 U.S. 563, 568 (U.S. 1968), the Court acknowledged the long history of protection of teachers' first amendment rights:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E. g., **Wieman v. Updegraff**, 344 U.S. 183 (1952); **Shelton v. Tucker**, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967). "The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." **Keyishian v. Board of Regents**, supra, at 605-606.

While both this Court and the appellate and trial courts have issued numerous opinions involving academic freedom claims by individual faculty members, few of them involve the teacher's right to assign grades or otherwise evaluate her students. In a somewhat different context, the professor's authority over grading was addressed by the Supreme Court in ***Board of Curators of the Univ. of Mo. v.***

Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). In that case, a student at the University of Missouri-Kansas City Medical School was dismissed by officials of the school for failure to meet academic standards. The students sued the officials alleging among other things that she had not been accorded her procedural due process prior to her dismissal.

The Court stated that "[l]ike the decision of an individual professor as to the proper grade for a student in his course, the determination of whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." Id. at 90, 98 S.Ct. at 955. In a concurring opinion, Justice Powell concluded that the professor should retain wide discretion in his evaluation of the academic performance of his students. Id. at 96, n. 6, 98 S.Ct. at 958, n. 6 (Powell, J., concurring).

Thus ***Horowitz*** recognizes that evaluation of a student achievement "requires an expert evaluation of cumulative information," which the instructor of record is in the best position to provide, but the case does not clearly delineate the relative roles of the professor and the institution.

The lower and appellate courts have addressed that question, but without thoroughly explaining where the teacher's rights end and the institution's rights begin.

Probably the leading case on this issue is ***Parate v. Isibor***, 868 F.2d 821 (6th Cir. 1989). In ***Parate***, when a nontenured professor was terminated at the end of one-year contract, he brought a section § 1983 action against university officials. The professor claimed that he was disciplined for refusing to change the letter grade of one of his students. The District Court dismissed the claim, but the Court of Appeals held that university officials violated the professor's right to academic freedom when they ordered him to change the student's grade. The court observed that as did any communicative act, assigning a letter grade sent a message to the recipient. The court pointed out that the

message communicated by the letter grade "A" was virtually indistinguishable from the message communicated by a formal written evaluation indicating "excellent work." Because the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act was entitled to some measure of First Amendment protection:

> The individual university professor may claim that his assignment of an examination grade or a final grade is communication protected by the First Amendment. As does any communicative act, assigning a letter grade sends a message to the recipient. The message communicated by the letter grade "A" is virtually indistinguishable from the message communicated by a formal written evaluation indicating "excellent work." Both communicative acts represent symbols that transmit a unique message.
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> * * *
>
> The freedom of the university professor to assign grades according to his own professional judgment is of substantial importance to that professor. To effectively teach her students, the professor must initially evaluate their relative skills, abilities, and knowledge. The professor must then determine whether students have absorbed the course material; whether a new, more advanced topic should be introduced; or whether a review of the previous material must be undertaken. Thus, the professor's evaluation of her students and assignment of

their grades is central to the professor's teaching method.

Parate at 827-828.

The court appeared to make it clear that the issue was not the ultimate grade given to the student, but the professor being compelled to give a particular grade, rather than to grade according to his own professional judgment. Had the school administratively changed the grade, rather than compelling the professor to change the grade, there would have been no constitutional violation:

> The defendants' act of ordering Parate to change the grade, rather than the act of giving Student "Y" a different grade than Parate desired, gives rise to the constitutional violation.
>
> * * *
>
> Parate correctly contends that even as a nontenured professor, he retains the right to review each of his students' work and to communicate, according to his own professional judgment, academic evaluations and traditional letter grades. Parate, however, has no constitutional interest in the grades which his students ultimately receive. If the defendants had changed Student "Y's" "GSW" course grade, then Parate's First Amendment rights would not be at issue. Parate's First Amendment right to academic freedom was violated by the defendants because they ordered Parate to change Student "Y's" original grade. The actions of the defendants, who failed to administratively

> change Student "Y's" grade themselves, unconstitutionally compelled Parate's speech and precluded him from communicating his personal evaluation to Student "Y."

Parate at 829 -829.

The District Court and the Court of Appeals construed ***Parate*** more narrowly than either the language in the case warranted or than this Court's prior law would seem to suggest appropriate. The two courts appeared to see the professor's First Amendment rights concerning the issuance of grades as limited to a single circumstance: the university ordering a professor to change a grade. However, the language cited above is not nearly so narrow. Rather, it is the forced speech against professional judgment that the First Amendment prohibits. The assignment of a particular grade is simply one example of such forced speech. In the instant case, Nelson-Burns attempted to force Petitioner to write individual letters to students in accord with her (Nelson-Burns') wishes, and against the professional judgment of Petitioner. It was the epitome of compelled speech. Furthermore, while Nelson-Burns did not directly command Petitioner to issue a specific grade or to change a grade, following her directive would have been tantamount to raising the grade of the students. Had Nelson-Burns simply administratively changed the incompletes to a letter grade, for example, there would have been no constitutional violation.

Many courts have recognized that a teacher's First Amendment rights encompass the notion of "academic freedom" to exercise professional judgment in selecting topics and materials for use in the course of the educational process. See, e.g., ***Stachura v. Truszkowski***, 763 F.2d 211, 215 (6th Cir. 1985), rev'd in part on other grounds, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986); ***Kingsville Independent School Dist. v. Cooper***, 611 F.2d 1109, 1113 (5th Cir. 1980); ***Cary v. Board of Education***, 598 F.2d 535,

539-42 (10th Cir. 1979); ***Keefe v. Geanakos***, 418 F.2d 359, 362 (1st Cir. 1969). The right to exercise professional judgment in evaluating the performance of students would not seem to be of such a different nature as to be without First Amendment protection. By so narrowly construing the First Amendment protection of professors in their role as evaluators of student performance, the Sixth Circuit has deprived university teachers of their ability to fairly and impartially evaluate students and assign grades. Furthermore, it has deprived students of their right to expect that their professors, in the best position to provide "expert evaluation of cumulative information," ***Horowitz*** at 90, will evaluate their performance strictly in accordance with their best professional judgment, free from interference by perhaps well-meaning administration officials

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS A. SOBECKI
811 Spitzer Bldg.
520 Madison Avenue
Toledo, OH 43604-1304
PH: (419) 242-9908
FAX: (419) 242-9937

APPENDIX A

ROSEMARY JOHNSON-KUREK, Plaintiff-Appellant, v. SAMIR ABU-ABSI; THOMAS BARDEN; and CAROL NELSON-BURNS, Defendants-Appellees.

No. 04-4502

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

05a0389p.06;

423 F.3d 590; 2005 U.S. App. LEXIS 19666; 2005 FED App. 0389P (6th Cir.)

August 9, 2005, Argued
September 13, 2005, Decided
September 13, 2005, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 03-07500. James Gwin, District Judge.

COUNSEL: ARGUED: Thomas A. Sobecki, Toledo, Ohio, for Appellant.

Anastasia Kay Hanson, SPENGLER NATHANSON, Toledo, Ohio, for Appellees.

ON BRIEF: Thomas A. Sobecki, Toledo, Ohio, for Appellant.

Anastasia Kay Hanson, Theodore M. Rowen, SPENGLER NATHANSON, Toledo, Ohio, for Appellees.

JUDGES: Before: BOGGS, Chief Judge; SUTTON, Circuit Judge; and RICE, District Judge. *

> * The Honorable Walter H. Rice, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINIONBY: BOGGS

OPINION:

[*591] [***1] BOGGS, Chief Judge. Rosemary Johnson-Kurek appeals the district court's dismissal of her claims under 42 U.S.C. § 1983 against Samir Abu-Absi, Thomas Barden, and Carol Nelson-Burns, tenured faculty members of the University of Toledo. Johnson-Kurek, then a part-time lecturer in the Department of English and the Department of Theater and Film at the University of Toledo, alleged that her First Amendment rights to free speech and academic freedom were violated when the English Department denied her a second class [**2] to teach in the Fall semester of 2001, in retaliation for her refusal to comply with a request that she communicate more clearly to her students what was required to complete the coursework in a

students what was required to complete the coursework in a class she taught in the Fall of 2000. Holding that a [***2] university may constitutionally require a lecturer to provide detailed advice to students about the administrative aspects of a course, we affirm the judgment of the district court.

I

This case arose in the Spring of 2001, when a student in Johnson-Kurek's organizational writing class the previous Fall complained to English Department Professor Jane Bradley that Johnson-Kurek had refused to explain to him what he needed to do in order to convert his grade of "incomplete" to a final course grade. It turned out that Johnson-Kurek had given an incomplete to thirteen of the seventeen students in that class because their work was substandard. She had posted a message on an automatic mailing list service [*592] ("listserv") for the course, stating that these incomplete grades had each been assigned for one or more of three reasons (proper formatting, proper citations, and/or textual changes), but left it up to each student to determine [**3] which of these reasons applied to his or her own case. The posting explained how and when revised assignments should be handed in, and warned that any textual (as opposed to formatting) revisions to assignments were to receive pre-clearance from Johnson-Kurek. A subsequent posting on the same listserv expanded slightly on the reason for several of the incompletes, namely poor citation of authority, but did not specify which students had received an incomplete for that particular reason. Johnson-Kurek stated in one of these messages that she had "very sound and ethical reasons for not providing students with specific, individual

complaint that writing individualized letters would have interfered with the students' learning experience and the purpose of the class.

Professor Bradley forwarded the student's request to Carol Nelson-Burns, the Director of Technical Writing in the Department of English and Johnson-Kurek's immediate supervisor, who told Johnson-Kurek that her listserv postings about the incompletes were not sufficiently clear for the students to know what to do to complete the course, and requested that she prepare [**4] letters to each student containing individualized instructions for obtaining a final grade in the course. In a memo to Johnson-Kurek memorializing the meeting, Nelson-Burns summarized her request as follows:

> As we discussed, a more specific statement needs to be prepared for ***each*** student and ***each*** student needs to be told specifically what he or she must do to finish the coursework and earn a grade. Please note that although your instructions in those published messages may seem clear, a given student may still be confused as to what is expected of him or her personally. Please draft those statements and share them with me before forwarding them to students.

(emphasis in original).

Five weeks later, after receiving additional complaints that Johnson-Kurek had not provided any additional information to the students, Nelson-Burns repeated her request that Johnson-Kurek provide her with draft letters to each student, and emphasized that the continuing incompletes were a serious problem for the involved students because the grades affected their GPA and their financial aid status. Johnson-Kurek did not respond to this renewed request, nor to a series [**5] of phone calls and mailbox notes. In the end, Nelson-Burns had to wait outside Johnson-Kurek's classroom to speak with her before class. Johnson-Kurek never prepared the requested letters.

Johnson-Kurek complained to Samir Abu-Absi, Chair of the Department of English, about Nelson-Burns, but he refused to intervene. She also complained to Thomas Barden, Associate Dean for Humanities in the College of Arts and Sciences, who told Johnson-Kurek that she could not file a grievance because she was not a member of a bargaining unit recognized by the University.

During the Fall semester of 2001, Johnson-Kurek taught one course in the Department of English and two courses in the Department of Theater and Film. Abu-Absi, Barden, and Nelson-Burns [***3] claim that Johnson-Kurek was offered a second class by the English Department on at least two occasions, but turned it down each time due to scheduling conflicts. Johnson-Kurek claims that a second class was withheld by the Department [*593] of English in retaliation for her refusal to cooperate with Nelson-Burns's requests regarding the incompletes. It was suggested during oral argument by counsel for Johnson-Kurek that the Department

of English [**6] may have refused to work around Johnson-Kurek's schedule as a result of the dispute.

Johnson-Kurek filed suit against Abu-Absi, Barden, and Nelson-Burns in August 2003, alleging that her First Amendment rights to free speech and academic freedom were violated when she was instructed by Nelson-Burns to send letters to her students, and when Abu-Absi "took no action" in response to her complaint about Nelson-Burns's instruction, and denied her a second class for the Fall semester. She also alleged that her Fourteenth Amendment rights were violated when Barden advised her that she had no right to file a grievance because she was not a member of a bargaining unit.

The district court dismissed Johnson-Kurek's claims against all three defendants for lack of subject matter jurisdiction, on Eleventh Amendment and qualified immunity grounds; for failure to state a claim; and, in the case of her claims against Nelson-Burns, as time-barred. On appeal, Johnson-Kurek raises two issues. First, she argues that the district court erred by holding that she had failed to present any evidence that her constitutional rights were violated by the alleged attempts of all three defendants to force her to [**7] write to her students, a holding that underpinned the dismissal of her claims for failure to state a claim and on qualified immunity grounds. Second, she argues that the district court erred by refusing to allow her to amend her complaint to specify more clearly that her due process claim against Barden was predicated on her interests in freedom of speech and academic freedom.

II

Johnson-Kurek argues that her First Amendment rights were violated when she was asked to communicate with her students by Nelson-Burns, and when she was denied a second class to teach as a result of her refusal. We disagree.

"To the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors." *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 263, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (Frankfurter, J., concurring) (describing the "four essential freedoms of a university": "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and [**8] who may be admitted to study."). "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968); *see also* ***Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989)** ("The administration of the university rests not with the courts, but with the administrators of the institution.").

These "essential freedoms" of a university encompass the right to determine how classes are to be taught, and grades assigned:

> A nontenured professor does not escape reasonable supervision in the manner in which she conducts her classes or assigns her grades.

> University officials remain free to review a professor's classroom activities when determining whether to grant or deny tenure. The [*594] university may constitutionally choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods do not conform to institutional standards. The First Amendment concept of academic [***4] freedom does not require that a nontenured professor be made [**9] a sovereign unto himself.

***Parate*, 868 F.2d at 827** (internal citations omitted); *see also Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001) ("Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught. We therefore conclude that a public university professor does not have a First Amendment right to expression via the school's grade assignment procedures.").

This is not to say that professors must leave their First Amendment rights at the campus gates. "That a teacher does have First Amendment protection under certain circumstances cannot be denied." ***Parate*, 868 F.2d at 827** (quoting *Fowler v. Board of Educ.*, 819 F.2d 657, 662 (6th Cir.), *cert. denied*, 484 U.S. 986, 98 L. Ed. 2d 501 (1987)); *see also Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625, 629 (7th Cir.), *cert. denied*, 474 U.S. 1007, 88 L. Ed. 2d 460 (1985) (the term academic freedom "is used to denote both the freedom of the academy to pursue its end

without interference from the government . . . and the freedom [**10] of the individual teacher . . . to pursue his ends without interference from the academy . . . ."). For example, there are limits on the extent to which a university may require a professor to endorse actively the university's decisions about pedagogy and grading. In ***Parate***, we considered the case of a non-tenured associate professor at Tennessee State University, who was required by the University to change the grade of a student from a "B" to an "A." *See* **868 F.2d at 824**. Although the University could have changed the grade by fiat without involving Parate, Parate was required not only to change the grade himself, but to sign a memorandum stating that he had amended the grading policy for the class in a way that would retroactively justify the change of grade. *Ibid.* Parate did sign such a memorandum, but added a notation to the effect that the change was made at the instruction of the Dean. When instructed to sign a clean copy of the memorandum without adding any notation, he refused, and, as a result, his contract was not renewed the following year. *Ibid.* We held that the requirement that Parate personally sanction the change of grade by signing the memorandum [**11] violated his rights to free speech and academic freedom. *Ibid.*

Our concern in *Parete* was not with the University's insistence that the grade be changed, but only with the insistence that Parete himself make and endorse that change. A professor's own evaluation of a student's work, and the grade that he or she decides to assign to reflect that evaluation is an important part of a professor's teaching method. ***Id.* at 828**. The grade that is affixed to a student's

transcript, however, is the concern of the university. *See* ***id.*** **at 830** ("If [the University] deemed Parate's grade assignments improper, however, the defendants could have achieved their goals by administratively changing [the student's] grade."). In other words, the university may override the professor's evaluation, and change the assigned grade. It may not require him to publicly endorse those changes.

In this case, Johnson-Kurek's First Amendment rights were not implicated, still less violated, by Nelson-Burns's request that she explain to her students the precise requirements for obtaining a final [*595] grade in her class. She was not required to communicate the ideas or evaluations [**12] of others as if they were her own. She was not even told what grades to assign her students, or what the requirements for completing the class should be. She was simply required, as one might be in preparing a syllabus, to spell out in detail the requirements she had devised. While the First Amendment may protect Johnson-Kurek's right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of a university to decide what may be taught and how it shall be taught would be [***5] meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy. n1

n1 Ironically, the aspect of Nelson-Burns's request that Johnson-Kurek found most objectionable -- that she would have to identify for each student the

shortcomings and errors in his or her assignment, and explain how to improve and correct them -- seems to have been her own fault. It was only because she assigned grades of incomplete to work that was not incomplete in the sense of being partially finished, but was simply of poor quality, that her explanations of how to pass the class had to touch on the substantive aspects of the course.

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III

In order to succeed on a section 1983 claim, Johnson-Kurek had to prove that the defendants (1) acted under color of law, and (2) deprived her of her rights under the Constitution or laws of the United States. *See Upsher v. Grosse Pointe Pub. Sch. Sys.*, 285 F.3d 448, 452 (6th Cir. 2002). It is undisputed that all three defendants, as public officials, acted under color of state law. As the district court correctly held, however, Johnson-Kurek failed to identify any violation of her constitutional rights as a result of the alleged efforts of each defendant to force her to write to her students. As explained above, Nelson-Burns's request that she write to her students did not implicate Johnson-Kurek's First Amendment rights. Nor, *a fortiori*, did Abu-Absi's failure to intercede on Johnson-Kurek's behalf in her dispute with Nelson-Burns, nor his alleged refusal to give her a second class to teach as a result of that dispute. Although the non-renewal of the contract of a non-tenured instructor at a public university may not be predicated on his or her exercise of First Amendment rights, *see Perry v. Sindermann*, 408 U.S.

593, 598, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), [**14] Johnson-Kurek was not exercising her First Amendment rights by refusing to comply with Nelson-Burns's request. Finally, Johnson-Kurek's failure to allege a violation of her First Amendment rights renders moot her claim that she should have been permitted to amend her complaint to make clear that her Fourteenth Amendment claims against Barden were predicated on the alleged violation of her First Amendment rights by Nelson-Burns and Abu-Absi, about which she wished to file a grievance.

Because we hold that the district court properly dismissed Johnson-Kurek's complaint for failure to state a claim, we need not address the alternative grounds given by the district court for dismissing her complaint.

IV

For the reasons discussed above, we AFFIRM the judgment of the district court.

APPENDIX B

United States District Court
Northern District of Ohio

ROSEMARY JOHNSON-KUREK, Plaintiff,
v.
SAMIR ABU-ABSI, et al., Defendants

CASE NO. 3:03cv7500

OPINION AND MEMORANDUM

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Defendants Samir Abu-Absi, Thomas Barden, and Carol Nelson-Burns move this Court, under Fed. R. Civ. P. 12(b)(1), to dismiss this case for lack of subject matter jurisdiction Defendants also move for judgment on the pleadings under Fed. R. Civ. P. 12(c). With their Motion, the Defendants principally argue that the Eleventh Amendment bars this action. Alternatively, the Defendants say they enjoy qualified immunity from Plaintiff's claims. Plaintiff Rosemary Johnson-Kurek opposes Defendants' motion. After considering the pleadings and the applicable law, the Court GRANTS Defendants' motion to dismiss for lack of subject matter jurisdiction and GRANTS Defendants' motion for judgment on the pleadings.

I. Background

On August 27, 2003, Plaintiff sued Defendants in their individual and official capacities. Plaintiff brings this action under 42 U.S.C. §1983. Plaintiff is a non-tenured lecturer in the University of Toledo's

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Department of English Language and Literature and the Department of Theater and Film. Defendant Abu- Absi chairs the English Department. Defendant Barden acts as the Associate Dean for Humanities in the University's College of Arts and Sciences. Defendant Nelson-Burns serves as the English Department's Director of Technical Writing.

Since 1990, Plaintiff worked as a part-time lecturer at the University. With one exception, Plaintiff taught two courses in each academic term. In her complaint, Plaintiff objects to actions that began in the Fall 2000 semester. During that semester, the Plaintiff taught a technical writing class for the English Department. When some of Plaintiff's students used improper citation forms, she issued them grades of "incomplete." Plaintiff e-mailed the students to generally inform them of their errors.

After issuing the grades Plaintiff met with Defendant Nelson-Burns, the English Department's Director of Technical Writing. Plaintiff explained the steps she had taken and gave Nelson-Burns a copy of the e-mail she had sent to the students. When Plaintiff logged out of her private e-mail during the meeting, Nelson-Burns allegedly "expressed her displeasure" with Plaintiff for doing so. [Doc. 1 ¶ 21]. A week after this meeting, Nelson-Burns sent Plaintiff a memorandum stating that Plaintiff should write letters to the

students providing specific instructions on what steps the Plaintiff would require to change their grades. Plaintiff asserts that the memorandum contained "misleading statements and inferences" that damaged Plaintiff's reputation. While generally alleging a damaged reputation, Plaintiff provides no details. Id. at ¶ 22. Plaintiff also disagreed with Nelson-Burns' direction, saying that sending instructive letters to the students would have undermined their learning experience. When Plaintiff failed to comply with the initial requests, Nelson-Burns went to Plaintiff's classroom and demanded the letters.

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The Plaintiff then contacted Defendant Abu-Absi, the Chair of the English Department. Plaintiff asked Abu-Absi if she had to write the letters. English Department Chair Abu-Absi said she did not. Plaintiff never wrote the letters.

Near August 20, 2001, Plaintiff learned that she would only teach one class during the Fall 2001 semester. Plaintiff alleges that the English Department denied her a second class because she was uncooperative and for other supposedly false, capricious, and arbitrary reasons. Plaintiff asserts, without any factual explanation, that "[w]ithholding of this course was as a result of the dispute involving Plaintiff's exercise of her First Amendment rights." *Id.* at ¶ 30. Although Plaintiff identifies no basis for her assertion that the course schedule resulted from disciplinary action, Plaintiff contacted Defendant Abu-Absi to ask about the disciplinary process. Plaintiff asked Abu-Absi to review the so-called disciplinary action, and Abu-Absi allegedly told her

"to forget about it." *Id.* at ¶ 32. On August 27, 2001, Abu-Absi issued Plaintiff a contract to teach only one course.

After the Plaintiff attempted to file a formal written grievance, Defendant Associate Dean Barden told the Plaintiff near January 16, 2002, that Plaintiff could not file the grievance because she was not a bargaining unit employee. Associate Dean Barden refused to give Plaintiff a grievance form. With her complaint, the Plaintiff alleges that as an instructor, she was a member of the University's "instructional staff" under the University's bylaws and entitled to file the grievance.

In support of her action, the Plaintiff alleges that Defendant Barden violated her procedural due process rights under the Fourteenth Amendment. Plaintiff also alleges that Defendants Abu-Absi and

Nelson-Burns violated her rights of free speech and academic freedom under the First Amendment.

II. Legal Standard

A. Rule 12(b)(1) Motion/Immunity

Defendants move the Court under Fed. R. Civ. P. 12(b)(1) to dismiss Plaintiff's claims for lack of subject matter jurisdiction. A Rule 12(b)(1) motion can attack either the legal or the factual basis for jurisdiction. United States v. Ritchie, 15 F.3d 592, 598 (6th Cir. 1994). Where a defendant challenges the factual basis for subject matter jurisdiction,

"the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1134 (6th Cir. 1996). Where a defendant challenges the legal basis, the Court accepts the complaint's allegations as true. Ritchie, 15 F.3d at 598.

The parties disagree on whether Defendants wage a factual or legal assault on jurisdiction. The Court's decision would remain the same under either approach. Defendants base their jurisdictional argument on absolute Eleventh Amendment immunity and qualified immunity.

Although the Eleventh Amendment poses jurisdictional issues, it is not precisely an issue of subject matter jurisdiction. Ernst v. Roberts, 379 F.3d 373, 378 (6th Cir. 2004). Rather, the Eleventh Amendment provides an affirmative defense, not a limitation on jurisdiction. Id. The party asserting Eleventh Amendment immunity bears the burden of establishing it. Gragg v. Kentucky Cabinet for Workplace Dev., 289 F.3d 958, 963 (6th Cir. 2002).

Defendants also say they have qualified immunity to Plaintiff's claims. Qualified immunity is an

affirmative defense shielding government officials from liability so long as their conduct does "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). To overcome the qualified immunity defense, Plaintiff must establish that Defendants violated a clearly established constitutional right. Gragg, 289

F.3d at 964. Although courts usually address qualified immunity at the summary judgment stage, Defendants may raise the defense in a motion to dismiss. Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 677 (6th Cir. 2001).

B. Rule 12(c) Motion

A court analyzes a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) using the same standard as a motion to dismiss under Rule 12(b)(6). Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). Therefore, the Court construes the complaint in the light most favorable to Plaintiff, accepting all of the well-pleaded factual allegations as true. Meador v. Cabinet for Human Res., 902 F.2d 474, 475 (6th Cir. 1990). The Court will not accept as true legal conclusions or unwarranted factual inferences. Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987).

C. Section 1983 Claims

Plaintiff seeks to hold Defendants responsible under 42 U.S.C. § 1983 for the alleged violations of her rights First and Fourteenth Amendment rights. To succeed on a section 1983 claim, Plaintiff must show that Defendants (1) acted under color of law, and (2) deprived Plaintiff of her rights under the United States Constitution or other federal law. See Upsher v. Grosse Pointe Pub. Sch. Syst., 285 F.3d 448, 452 (6th Cir. 2002) (citing Flagg Bros. v. Brooks, 436 U.S. 149, 155-57 (1978)). Section 1983 thus provides a mechanism to protect rights otherwise conferred. Albright v. Oliver, 510 U.S. 266, 271

(1994).

III. Analysis

Plaintiff alleges that Defendant Barden violated her procedural due process rights under the Fourteenth Amendment. Plaintiff alleges that Defendants Abu-Absi and Nelson-Burns violated her rights of free speech and academic freedom under the First Amendment. Responding, the Defendants argue that they have both Eleventh Amendment immunity and qualified immunity to Plaintiff's claims. The Defendants also say that the Plaintiff has not identified any federal constitutional or statutory rights that have been violated. Finally, the Defendants argue that the claims are time-barred and that Plaintiff can prove no facts in support of her claims that would entitle her to relief.

The Court will address each defense in turn.

A. Immunity

1. Eleventh Amendment

Defendants contend that the Eleventh Amendment stops Plaintiff's claims seeking retroactive monetary relief for acts the Defendants committed in their official capacities. Plaintiff does not dispute that Defendants have absolute immunity to claims for retroactive monetary relief involving acts in the Defendants' official capacities. Further responding, the Plaintiff argues that Defendants lack

immunity for claims seeking prospective injunctive relief arising out of their official acts. Plaintiff further argues that Defendants are not immune to claims seeking monetary relief from Defendants in their individual capacities.

Even reading the complaint in the light most favorable to Plaintiff, the Court finds that Defendants

have Eleventh Amendment immunity to Plaintiff's official-capacity claims for monetary relief. Defendants do not have absolute immunity to Plaintiff's official-capacity claims for prospective injunctive relief, or to Plaintiff's individual-capacity claims.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Eleventh Amendment immunity prevents federal courts from exercising jurisdiction over a claim for money damages, and bars all suits, whether for injunctive, declaratory, or monetary relief, against the state and its departments. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101-01 (1984). On its face, the Eleventh Amendment does not stop citizens of a state from suing their own state. However, the Supreme Court has found that Eleventh Amendment immunity extends to suits against a state by that state's own citizens. See S.J. v. Hamilton County, 374 F.3d 416, 419 (6th Cir. 2004).

The Eleventh Amendment does not apply in two situations: (1) If Congress has abrogated the state's immunity or (2) If the state has waived its immunity from suit in federal court. Thiokol Corp. v. DOT, 987 F.2d 376, 381 (6th Cir. 1993). Congress has not abrogated Ohio's immunity to section 1983 claims, and Ohio has not waived its immunity. See Mackey v. Cleveland State Univ., 837 F. Supp. 1396, 1403 (N.D. Ohio 1993).

While the Eleventh Amendment stops claims for money damages against states, the Eleventh Amendment does not stop suits against individual state officers acting in their individual capacities. Hafer v. Melo, 502 U.S. 21, 25 (1991). Nor does the Eleventh Amendment bar suits for prospective injunctive

relief against individual state officers in their official capacities. McKay v. Thompson, 226 F.3d 752, 757 (6th Cir. 2000).

a. Official-Capacity Claims

The law is clear. "Any action for retrospective relief against a state in federal court is barred by the Eleventh Amendment." Mackey, 837 F. Supp. at 1403. The Eleventh Amendment does not bar injunctive relief against state officials in their official capacities. McKay, 226 F.3d at 757. Eleventh Amendment immunity extends to entities that are arms of the state, and to their officers when acting in their official capacities. Hall v. Medical Coll. of Ohio, 742 F.2d

299, 301 (6th Cir. 1984); Mackey, 837 F. Supp. at 1404. Plaintiff does not challenge the University's status as an arm of the state. See Ohio Rev. Code §§ 3360.01-.05; Al-Marayati v. University of Toledo, No. 97-3161, 1998 U.S. App. LEXIS 9797, at *9-10 (6th Cir. May 12, 1998). The Court finds that the Eleventh Amendment bars Plaintiff's official-capacity claims for monetary relief. The Eleventh Amendment does not bar Plaintiff's officialcapacity claims for injunctive relief.

b. Individual-Capacity Claims

Plaintiff also sues Defendants in their individual capacities. Defendants say that although the complaint purports to sue them in their individual capacities, it does not allege any acts taken by Defendants in such an individual capacity. Defendants contend that because their actions were "inextricably linked and bound to their official duties," they have Eleventh Amendment immunity to Plaintiff's individual-capacity claims. Plaintiff responds that she can sue Defendants in their individual capacities for acts taken in the scope of their employment.

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Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978). Individual-capacity suits "seek to impose individual liability upon a government officer for actions taken under color of state law." *Hafer*, 502

U.S. at 25. As described above, the Eleventh Amendment does not bar individual-capacity suits against state officials. *Mackey*, 837 F. Supp. at 1404. Defendants do not have Eleventh Amendment immunity to the individual-capacity claims. *See BPNC, Inc. v. Estep*, No. 3:02cv7620, 2004 U.S. Dist. LEXIS 10738, at *24 (N.D. Ohio May 10, 2004).

2. Qualified Immunity

Defendants say that they have qualified immunity to Plaintiff's individual-capacity claims because Plaintiff failed to establish a violation of a clearly-established constitutional right. Plaintiff responds that Defendants violated her First Amendment rights of free speech and academic freedom, and her Fourteenth Amendment right of procedural due process. Viewing the complaint in the light most favorable to Plaintiff, the Court finds that Defendants have qualified immunity to Plaintiff's individual-capacity claims.

Qualified immunity is an affirmative defense provided to state officials performing discretionary functions. *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982). In determining whether qualified immunity stops claims against the Defendants, the Court must first determine whether, based upon the applicable law, the facts viewed in the light most favorable to the Plaintiff show that a constitutional violation has occurred. If the Court finds a constitutional violation, it must then consider whether the violation involves "clearly established statutory or constitutional rights of which a reasonable person would

have known." Harlow, 457 U.S. at 818. The inquiry focuses on whether a reasonable official in the defendant's position "could have believed his conduct to be lawful, considering the state of the law as it existed when the defendant took his challenged actions." Poe v. Haydon, 853 F.2d 418, 427 (6th Cir. 1988). To overcome the qualified immunity defense, "the illegality of the action must be apparent." Danese v. Asman, 875 F.2d 1239, 1242 (6th Cir. 1989). Qualified immunity bars claims where the public official reasonably believed their actions were legal. Id.

Once a defendant raises qualified immunity, the plaintiff "must produce additional facts or allegations demonstrating that his constitutional rights were violated and that these rights were so clearly established that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct." Mackey, 837 F. Supp. at 1405.

a. Defendant Thomas Barden

Defendant Barden serves as an Associate Dean in the University's College of Arts and Sciences. The Plaintiff is a member of the University's instructional staff. Id. at ¶ 8. The University's bylaws provide a grievance procedure for "aggrieved instructional staff member[s]." Id. at ¶ 19. Plaintiff alleges that "[b]y failing to permit Plaintiff to file a grievance as permitted under the Bylaws and General Rules of the University of Toledo, Defendant Barden violated Plaintiff's due process rights under the Fourteenth Amendment."

To establish a due process violation, Plaintiff "must prove that [she] was deprived of a property or liberty interest . . . . " Mackey, 837 F. Supp. at 1405. In an unpublished opinion addressing nonrenewal of faculty appointments, the Sixth Circuit stated that "[t]he mere nonretention of a teacher . .

. is not tantamount to a deprivation of liberty." Kerlin v. Zahn, No. 81-3576, 1983 U.S. App. LEXIS 12771, at *11 (6th Cir. July 6 1983). Additionally, "an employment contract which is terminable or nonrenewable at the end of the any given year generally creates no property interest protected by procedural due process." Id. Even if the Plaintiff can show that Defendant Barden did not afford her due process, she cannot make out a claim absent some showing of a liberty or property interest. The failure to grant a faculty member the level of process generally provided by school policy is not a due process violation. Id. at *13.

However, even without a liberty or property right, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." Perry v. Sinderman, 408 U.S. 593, 597 (1972). The denial of benefits may not "be predicated on [the plaintiff's] exercise of First and Fourteenth Amendment rights." Id. at 598.

In her pleadings, Plaintiff says she "has alleged that the actions taken against her were based upon her interest in freedom of speech and academic freedom." [Doc. 31 at 6]. In fact, that is not the case. Plaintiff's due process claim against

Defendant Barden revolves around his alleged denial of her request to file a grievance. [Doc. 1 ¶ 35]. Plaintiff alleges that Barden based the denial on his belief that "[Plaintiff] could not file a grievance because she was not a member of the bargaining unit." Id. at ¶ 33. Plaintiff never alleges that Barden predicated the denial on Plaintiff's exercise of her freedom of speech and academic freedom.

Apart from her earlier decision not to provide more than a general a general explanation to students regarding their performance, there does not seem to be any speech with which Plaintiff is associated. As

important, the Plaintiff does not allege that Barden advised her that the grievance procedure was unavailable because of her speech. Although Barden may have been mistaken in denying Plaintiff's grievance request, there is no allegation that he did so based on Plaintiff's exercising her First Amendment rights. Cf. Connick v. Myers, 461 U.S. 138, 146 (1983) (holding that dismissals of public employees that violate no constitutional right "are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable."). Nor is there any indication that Barden believed his actions to be illegal, or that he reasonably should not have taken the actions. Under these circumstances, and viewing the complaint in the light most favorable to Plaintiff, Defendant Barden has qualified immunity to Plaintiff's individual-capacity claims.

b. Defendant Samir Abu-Absi

Defendant Abu-Absi chairs the University's English Department. The Plaintiff alleges that Defendant Abu-Absi violated her First Amendment rights of freedom of speech and academic freedom by failing to intervene in the grievance process. In her papers opposing the motion to dismiss, Plaintiff contends that Abu-Absi violated her constitutional rights by issuing Plaintiff's contract to teach only one course. In response, the Defendants argue that Defendant Abu-Absi has qualified immunity to Plaintiff's individual-capacity claims because Plaintiff has not demonstrated that Abu-Absi violated any of Plaintiff's First Amendment rights.

Under the First Amendment, public employees may comment on matters of public concern without fear of reprisal from the government. See Perry, 408 U.S. 593, 597-98. Matters of public concern generally include "any matter of political, social, or other concern to the community." Rahn v. Drake Ctr.,

31 F.3d 407, 412 (6th Cir. 1994). See Connick, 461 U.S. at 147 ("When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."). Whether speech is on a matter of public concern is a legal issue for court. See Bonnell v. Lorenzo, 241 F.3d 800, 809-810 (6th Cir. 2001); Johnson v.

University of Cincinnati, 215 F.3d 561, 583 (6th Cir. 2000) ("The initial inquiry into determining whether a public employee's speech is a matter of public concern is a question of law for the court to decide.").

The protection of academic freedom is "a special concern of the First Amendment." Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). However, "[t]he administration of the university rests not with the courts, but with the administrators of the institution. A non-tenured professor does not escape reasonable supervision in the manner in which she conducts her classes or assigns her grades." Parate v. Isibor, 868 F.2d 821, 827 (6th Cir. 1989).

The parties agree that Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989), guides the Court's decision. In Parate, a non-tenured associate professor sued state university officials under section 1983 for violating his First Amendment right to academic freedom and his Fourteenth Amendment due process rights. In Parate, the professor gave a student a failing grade. University officials then required the professor to change the grade to an "A." The professor refused. The officials responded by berating the professor and threatening disciplinary action. The professor eventually agreed to change the grades under pressure from school officials. The Sixth Circuit affirmed in part and reversed in part the district court's

order granting summary judgment to the officials.

The court of appeals found that the school officials violated the professor's First Amendment rights by forcing

him to change the student's grade. Parate, 868 F.2d at 830. According to the Sixth Circuit, "assignment of a letter grade is a symbolic communication intended to send a specific message to the student . . . [and] is entitled to some measure of First Amendment protection." Id. at 827. Defendants' other actions, though "unprofessional," did not violate the professor's First Amendment right to academic freedom. Id. at 831.

Plaintiff's allegation that Defendant Abu-Absi violated her First Amendment rights by not intervening in the disciplinary process does not hold water. Plaintiff offers no authority to show that the Constitution somehow required Abu-Absi to intervene on Plaintiff's behalf. Nor does Plaintiff suggest that Abu-Absi did not reasonably believe his actions were legal. Plaintiff's unhappiness with Abu-Absi's position simply does not implicate her First Amendment rights. Defendant Abu-Absi also enjoys qualified immunity from Plaintiff's claim regarding her course assignment. Although a non-tenured instructor has no liberty or property interests in retaining her position (Kerlin, 1983 U.S. App. LEXIS 12771, at *10-11), a state university may not withdraw that position based on the instructor's exercise of her First Amendment rights. See Perry, 408 U.S. at 596. In this case, Abu-Absi's course assignment decision did not violate Plaintiff's First Amendment rights.

In Parate, the Sixth Circuit found that forcing a professor to change a grade violates the First Amendment right to academic freedom. Unlike Parate, in this case none of the Defendants ever required Plaintiff to change the grades assigned to the students. Instead, Defendant Nelson-Burns asked Plaintiff

to provide additional information to students who received "incomplete" grades. Plaintiff refused to do so. Defendant Nelson-Burns' instruction represented "reasonable supervision in the manner in which [Plaintiff] conducts her class or assigns her grades." Parate, 868 F.2d at 827. Plaintiff does not have a clearly established constitutional right to ignore Nelson-Burns' reasonable guidance.

Even assuming that Defendant Abu-Absi based Plaintiff's course assignment on her refusal to comply with Nelson-Burns' reasonable supervision, Abu-Absi did not violate Plaintiff's First Amendment rights or any "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. Providing clarification on how to change a grade of "incomplete" cannot be "fairly considered as relating to any matter of political, social, or other concern to the community." Connick, 461 U.S. at 146. Plaintiff's decision to depart from reasonable supervision was not a matter of public concern. There was no protected speech. For this reason, Defendant Abu-Absi enjoys qualified immunity to Plaintiff's individual-capacity claims.

c. Defendant Carol Nelson-Burns

Defendant Carol Nelson-Burns is the English Department's Director of Technical Writing. Plaintiff alleges that Defendant Nelson-Burns violated her First Amendment rights by "wrongfully intervening in the way Plaintiff taught her students and dealt with student performance." For good

measure, Plaintiff further alleges that Defendant Nelson-Burns violated Plaintiff's First Amendment rights by "attempting to force Plaintiff to violate her privacy rights with regard [to] her private e-mail." Id. at ¶ 28. Defendants argue that Nelson-Burns has qualified immunity because her actions did not implicate Plaintiff's First Amendment rights. The Court agrees with Defendants.

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Plaintiff's allegation regarding her e-mail account raises no constitutional issue. While meeting with the Plaintiff, Defendant Nelson-Burns allegedly expressed displeasure when Plaintiff logged off of her private e-mail account. *Id.* at ¶ 21. Plaintiff states that in so doing, Nelson-Burns violated Plaintiffs' right of academic freedom. Yet Plaintiff identifies no authority demonstrating how Nelson-Burns' displeasure rises to the level of a constitutional violation. Nelson-Burns has qualified immunity to Plaintiff's e-mail claim.

Plaintiff's claim regarding Nelson-Burns' supervision also fails. Plaintiff likens Defendant Nelson- Burns' actions to those of the university officials in *Parate*. Plaintiff reads *Parate* too broadly. Nelson- Burns never required Plaintiff to change any grade. In *Parate*, the Sixth Circuit found a First Amendment violation because university officials "ordered Parate to change [the student's] original grade." *Parate*, 868 F.2d at 829.

Here, Plaintiff sent e-mails to students receiving "incomplete" grades that "inform[ed] them generally of their errors." [Doc. 1 ¶ 20]. Nelson-Burns asked Plaintiff to

provide letters "explaining to each student specifically what was required in their particular case." [Doc. 1 ¶ 22]. Director Nelson- Burns' instructions did not require Plaintiff to change her evaluation of the students. She only asked Plaintiff to clarify what steps the students should follow to change their "incomplete" grades. Nelson-Burns' actions amounted to reasonable supervision of a non-tenured instructor, and did not limit Plaintiff's academic freedom or freedom of speech. *See Parate*, 868 F.2d at 827. Plaintiff's decision to not clarify how the students could change their "incomplete" grades does not rise to the level of protected speech. Nor is there any indication that Nelson-Burns did not reasonably believe here actions were legal. For these reasons, Nelson-Burns has qualified immunity.

B. Judgment On The Pleadings

Defendants offer two additional grounds for dismissal. First, they argue that Plaintiff's claims are time-barred. Second, they argue that Plaintiff can prove no set of facts entitling her to relief.

1. Statute Of Limitations

Defendants contend that Plaintiff's section 1983 claims are time-barred. In Ohio, section 1983 claims have a two-year statute of limitations. *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1105 (6th Cir. 1995). The limitation period begins to run when the plaintiff "knows or has reason to know of the injury which is the basis of the

action." *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984). Plaintiff filed her complaint on August 27, 2003. Claims for injuries arising before August 27, 2001 are time-barred.

Plaintiff bases her claim against Defendant Nelson-Burns on (1) Nelson-Burns' expression of displeasure with Plaintiff's use of her private e-mail, and (2) her requests that the Plaintiff clarify how the students could change their grades from "incomplete." The dispute between Plaintiff and Nelson-Burns began sometime during or shortly after the Fall 2000 semester. [Doc. 1 ¶ 20]. Nelson-Burns' intervention occurred before August 2001, when Plaintiff discussed the disciplinary process with Defendant Abu-Absi. *Id.* at ¶ 32. Because Defendant Nelson-Burns caused the alleged injury before August 27, 2001, the statute of limitations bars Plaintiff's claims against Nelson-Burns.

Although Plaintiff's claims against Defendants Abu-Absi fail for other reasons, they are not stopped by the statute of limitations. Plaintiff's claims against Abu-Absi involve his alleged failure to intervene in the disciplinary process and his issuance of Plaintiff's contract to teach only one class. Abu-Absi did not issue

the final contract offer until August 27, 2001. Until that point, Defendant Abu-Absi may have offered a second class to Plaintiff. Viewing the complaint in the light most favorable to Plaintiff, Abu-Absi's refusal to intervene in the disciplinary process did not occur until after August 27, 2001.

The claims against Defendant Barden are also not time-barred. Plaintiff's claim against Barden revolves around his decision not to allow Plaintiff to file a grievance under the University's bylaws. Defendant Barden made his decision on January 16, 2002, well within the limitations period.

2. Plaintiff Can Prove No Set Of Facts That Would Entitle Her To Relief

To succeed on a section 1983 claim, Plaintiff must show that Defendants (1) acted under color of law, and (2) deprived Plaintiff of her rights under the United States Constitution or law of the United States. *See Upsher v. Grosse Pointe Pub. Sch. Syst.*, 285 F.3d 448, 452 (6th Cir. 2002). Plaintiff adequately alleges that Defendants acted under color of state law. The Court addressed Plaintiff's failure to identify any deprivations of constitutional rights in its discussion of qualified immunity, and incorporates that discussion by reference. That failure entitles Defendants to judgment on the pleadings.

IV. Conclusion

For these reasons, the Court grants Defendants' motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and motion for judgment on the pleadings under Fed. R.

Civ. P. 12(c). The Court dismisses this suit with prejudice.

IT IS SO ORDERED.

Dated: October 25, 2004

s/ *James S. Gwin*

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE